

CANADA / JUDGMENT

Anand (Re)

2018 BCSC 400

COURT

Supreme Court of British Columbia

DECIDED

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2018 BCSC 400 Anand (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Anand (Re),

2018 BCSC 400

Date: 20180314

Docket: 127897

Registry: New Westminster

In the Matter of the Patients Property Act,

R.S.B.C. 1996, c. 349 and Amendments thereto

And

In the Matter of Shane Anand

Before: The Honourable Mr. Justice N. Brown

Reasons for Judgment

on Costs

Counsel for the Applicant, Public Guardian and Trustee of British Columbia:

P.A. Mazzone

Counsel for the Respondent, David Anand:

D.A. Hunter

Counsel for the Patient, Shane Anand:

J.J. Wingson, Q.C.

Dates of Written Submissions:

February 16, 2018

February 27, 2018

March 7, 2018

Place and Date of Judgment:

New Westminster, B.C.

March 14, 2018

- [1] On January 11, 2018, I issued Reasons for Judgment, indexed at 2018 BCSC 34, in which "The Public Guardian and Trustee ("PGT") applied for an order rescinding the appointment of David Anand as committee of his son, Shane Anand (the "Patient"). Specifically, the PGT ask[ed] that the committee order made by Madam Justice Gray on June 15, 2010 be rescinded and the PGT appointed as committee in place of David Anand", (para. 1.) The PGT also sought an order that it "be paid [its] reasonable costs and expenses of and incidental to [the] proceeding from the estate of the Patient", (para. 2, item 8.).
- [2] At para. 142 of my reasons I ordered, "The PGT is entitled to costs at Scale "B". If the parties wish to speak further to costs, they shall contact the Supreme Court Hearing Scheduler in New Westminster or Chilliwack."
- [3] Counsel for the PGT advised the hearing scheduler that the PGT wished to do so. On February 2, 2018, I advised counsel I would accept written submissions on costs from the PGT within 14 days, which would be February 16, 2018. I gave the respondent's opportunity to a reply within 10 days, which would be February 27, 2018. The PGT filed their submissions by February 16, 2018.

LEGAL PRINCIPLES

- [4] Section 27 of the Patient's Property Act, R.S.B.C. 1996, c. 349 [PPA] on which the PGT proceeded in its November 20, 2015 Notice of Application provides that, "The costs of all proceedings under this Act are in the discretion of the court".
- [5] With respect to the merits of the parties' positions, the PGT submitted the reasons for judgment assisted the PGT's arguments and positions during the hearing; and though the committee, David Anand, was not removed, the PGT's position was largely established.
- [6] The PGT submitted, however, being largely successful was not the test for an award of costs in matters of concern to the PGT, especially when the matters concerning the PGT involved the PPA.

- [7] Counsel submitted that in many different types of proceedings involving the PGT, either as party litigant or in its statutory role, the courts have awarded costs of the proceeding to the PGT, accepting the appropriateness of full indemnity for the legal costs incurred by the PGT from involving itself in a matter before the court that affected a party. For example, infants and persons under disability, whose interests are protected by the PGT under its statutory role or otherwise.
- [8] In *Demediuk v. Public Trustee* (February 6, 1996), Victoria Registry Docket No. 3033/95 (S.C.), the court awarded the PGT costs on a "special costs basis out of a patient's estate" where it had unsuccessfully opposed an application for an order declaring a patient no longer capable of managing their affairs. At p. 3, para. 3, Quijano J. referred to the decision of Anderson J.A., *White v. Rutter and Pacific Press Limited* (1988), 28 B.C.L.R. (2d) 385 (C.A.):

In my opinion, if the Public Trustee was exposed to payment of costs in all cases where actions brought by him failed to succeed, he might well be deterred from carrying out his statutory duty on behalf of the patient. For example, in the case on appeal, while the action was brought in good faith and was not frivolous, if the Public Trustee had known that he would be exposed to payment of costs, he might well have decided not to bring the action. In my view, it cannot be in the public interest to deter a statutory agent from carrying out his duties by exposing him to an order for costs.

- [9] Counsel also brought to the attention of the court the following cases reflective of the foregoing.
- [10] In *Potter (Re)*, 2000 BCSC 628 [Potter], the patient suffered a severe brain injury in a motor vehicle accident when he was roughly 14 years old. As a result, he was unable to care for himself. The issues, as set out at para. 6, involved questions of investments and jurisdiction under the Trustee Act, R.S.B.C. 1996, c. 464 and the PPA. The respondent PGT sought its own special costs of the application from Mr. Potter's estate, taking the position that except in special circumstances, it should "be entitled to costs and that here it is been acting to protect the patient pursuant to its "watchdog" role and its statutory mandate under the PPA: para. 58.
- [11] At para. 60 of *Potter*, Justice Smith noted that the PGT "had legitimate concerns about the petitioner's management of Mr. Potter's account in light of the fact that she had been in breach of her duties for most of her Committeeship." The petitioner was granted special costs of the application to be paid from the estate and was required to act under its statutory mandate. Smith J. granted the PGT its costs at Scale 4 from the estate, not special costs, because, "although the matter began as an ordinary attempt by the Public Trustee to fulfil its statutory mandate, as it progressed it developed some of the characteristics of a 'test case' and accordingly special costs [were] not appropriate." [Para. 61.]

- [12] In *Vieira (Re)*, 2013 BCCA 420 [Vieira], the Court of Appeal commented on s. 27 and its provision that the costs of proceedings under the PPA are in the discretion of the court. At para. 14, Groberman J., writing for the court, noted that while s. 27 "governs the awarding costs on applications for the appointment of committees [i]t provides little concrete guidance on the issue."
- [13] At para. 15 of *Vieira*, Groberman J.A. explained:
- [15] In my view, this provision should be read in a manner consistent with provisions dealing with costs in other civil proceedings. It should, in other words, be interpreted as giving the court very broad discretion to make costs awards. The discretion is not, however, completely unbounded. This court, therefore, has a role in determining whether the chambers judge exceeded the bounds of his discretion in determining that the appellant should bear her own costs.
- [14] With respect to applications for committee ship, however, the Court noted at para. 17:
- [17] [T]he usual practice of the Supreme Court is to award the successful applicant costs from the estate. This is a sensible position where the application is brought in good faith and where the applicant receives no obvious benefit from the appointment of a committee. Where a committee is appointed, it is because the court has concluded that it is in the best interests of the patient. A party who has brought an application that is found to be in the best interests of the patient, and with no ulterior motive, should be reimbursed for their costs in doing so.
- [15] With respect specifically to committee cases, counsel for the PGT pointed out that there is much authority for one or more parties to committee-related applications having their costs paid on a full indemnity.
- [16] The comments of the Court at para. 18 with respect to discretion are noteworthy:
- [18] While it appears to be the usual practice for a successful applicant on a committee ship application to be granted an order for special costs to be paid from the patient's estate, there is wide discretion to depart from this practice. If, for example, there are concerns about the motives of the applicant, the applicant's conduct of the application, or the ability of the estate to bear an order for costs, a different order might be called for. I do not suggest in any way that this is an exhaustive list of considerations.
- [17] In *Leeming (Re)*; *Mawdsley v. Austin*, [1984] B.C.J. No. 3048 (S.C.) where the parties contested which of them should be appointed committee, and had acted at all times in a manner that each considered to be in the best interests of the patient, the court ordered that both parties receive solicitor and client costs out of the patient's estate.
- [18] I note in passing that in *Royal Trust Corp. of Canada v. Clarke*, [1989] B.C.J. No. 340 (C.A.), the court confirmed that the preferred form of an order in committee cases was as follows:

This Court Orders that the Petitioner shall be paid its [reasonable] costs and expenses of an incidental to this application out of the estate of the [patient].

- [19] In *Bua (guardian ad litem of) v. Clegg*, 2006 BCSC 802, Ehrcke J. was satisfied that the participation of all the parties was intended to be for the benefit of Ms. Bua, and accordingly ordered that the costs of all parties to the applications were to be paid out of the estate of Ms. Bua on a special costs basis: para. 24.
- [20] In *Marczak (Re)*, 2007 BCSC 684 [Marczак], Johnston J. considered a case in which family members successfully applied for a committee order. The PGT had appeared and made submissions in the proceeding. At para. 19, Justice Johnston found the involvement of the PGT helpful during the course of the hearing and with respect to the submissions on costs. Accordingly, he ordered special costs to the PGT.
- [21] Counsel for the PGT submitted that it was apparent from the evidence presented in the application and from the reasons for judgment that the PGT was right to be concerned about the circumstances of the administration of the patient's estate. Counsel submitted further that although I did not rescind the committee order in place at the time, it was apparent that the application was made with the best interests of the patient in mind and that there was a genuine, valid and reasonable foundation for the arguments made which formed the basis of the application. That is a fair analysis of the bases for the PGT's involvement. The PGT clearly had the best interests of the patient in mind; and I agree there was a genuine and valid foundation for the arguments counsel made which formed the basis of the application.

Submissions of the respondent, David Anand

- [22] Mr. Anand noted that the original order made was that the PGT is entitled to costs at Scale "B" but that if the parties wished to further speak to costs, they were to contact the Supreme Court hearing scheduler for New Westminster or Chilliwack. It was pursuant to that order that counsel for the PGT brought their submissions for an order for special costs in favour of the PGT. The respondent here, Mr. Anand, submitted that my original order that the PGT be awarded costs on Scale "B" should not be amended.
- [23] Mr. Anand referred to some of the same authorities as counsel for the PGT and noted that there is a "wide discretion" to depart from the usual practice of the Supreme Court of B.C., which is to award a successful applicant special costs from the estate: see *Vieira*, para. 18, referred to above.
- [24] Counsel for Mr. Anand further noted that in *Marczак*, the court refused to order the PGT special costs for the time after the patient retained her own counsel so as to avoid additional expense to her estate. That reading of *Marczак* is not completely correct. The court only found that the patient's "exposure to fees and disbursements incurred by the Public Guardian and Trustee should ameliorate in order to avoid unnecessary additional expense to [the patient's] estate." The PGT submitted that the account for her representation was a proper debt of her estate and should be paid by her committees. As noted above, the court

did not conclude, however, that the PGT ought not to receive any indemnity after the patient retained counsel.

- [25] Counsel for Mr. Anand submitted, s. 27 of the PPA should be read in a manner that consists with provisions dealing with costs and other civil proceedings, which includes keeping the purpose for costs rules in mind; one such purpose being to encourage parties to settle whenever possible thus freeing up judicial resources for other cases: Vieira, paras. 15-16.
- [26] At paras. 10 and 11 of his submissions, Mr. Anand referred to Rule 9-1 of the Supreme Court Civil Rules in the various options available to the court the parties made an offer to settle. Rule 9-1 provides as follows:
10. One of the ways in which parties are encouraged to settle is through the use of formal offers to settle pursuant to Rule 9-1, which gives the court various options with respect to costs in cases where parties have made formal offers. The relevant provisions are as follows:
 - (4) The court may consider an offer to settle when exercising the court's discretion in relation to costs.
 - (5) In a proceeding in which an offer to settle has been made, the court may do one or more of the following:
 - (a) deprive a party of any or all of the costs, including any or all of the disbursements, to which the party would otherwise be entitled in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle;
 - (b) award double costs of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle;
 - (c) award to a party, in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle, costs to which the party would have been entitled had the offer not been made;
 - (d) if the offer was made by a defendant and the judgment awarded to the plaintiff was no greater than the amount of the offer to settle, award to the defendant the defendant's costs in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle.
 - (6) In making an order under subrule (5), the court may consider the following:
 - (a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or served or on any later date;
 - (b) the relationship between the terms of settlement offered and the final judgment of the court;
 - (c) the relative financial circumstances of the parties;

- (d) any other factor the court considers appropriate.
- 11. The most obvious and accepted intent of this Rule is to promote settlement by providing certainty to the parties as to what to expect if they make, or refuse to accept, an offer to settle.

Evans v. Jensen, 2011 BCCA 279, at paras. 35 and 41

- [27] The respondent, Mr. Anand, pointed out that on March 27, 2017, he made a formal offer to settle. The order relied on is attached as Appendix "A" to the outline of the submissions of the respondent.
- [28] Counsel for Mr. Anand submitted that my orders made were almost identical to terms set out in the formal offer. That is true to some extent, but my formal order was quite extensive and detailed matters beyond those included in the formal offer to settle.
- [29] Mr. Anand submitted that considering the formal offer made I should not amend my decision with respect to costs. (I should note in this regard, my costs provision was not a final one. I invited the parties to make further submissions, if they wished to do so.) Counsel for Mr. Anand submitted "it would be unduly financially burdensome to the estate to have to pay the [PGT]'s special costs of the entire proceeding", noting that "[a]s of May 2016, there was approximately \$13,000 available cash in the estate. That amount has decreased substantially since that time, due in part to the legal fees the estate has paid on behalf of Shane to his counsel."
- [30] Alternatively, the respondent submitted the applicant should receive its costs as follows:
 - (a) special costs until the date Shane retained his own counsel;
 - (b) costs on Scale "B" between the date Shane retained counsel and March 27, 2017; and
 - (c) no costs from March 27, 2017 forward on account of the respondent's settlement offer.
- [31] The respondent having submitted that the "offer ought reasonably to have been accepted [by the PGT] in the circumstances", and that the proposed offer was very similar to what was ultimately ordered. Further, the respondent submitted, as the PGT is "a government authority, [it] has financial resources to cover its own costs for a portion of the proceeding, whereas [the respondent submitted] allowing its costs to be paid as special costs from the estate would be a hardship for Shane's estate."

sur-reply

- [32] The PGT focused its reply on Mr. Anand's formal offer to settle, particularly paras. 12-17 of that offer. The PGT submitted that considering all the circumstances, it was not reasonable for it to accept the formal offer to settle, for the following proffered reasons:

1. The PGT's entitlement to have its fundamental concerns with respect to the conduct of the respondent, in respect of his dealings with Shane's funds, and whether his conduct entitled the PGT to rescission of the committee order.
 2. The formal offer's failure to address meaningfully the determination of Shane's interest in the family home. The PGT noted the formal offer simply stated: that "we continue to work with Shane's counsel to that end" - referring to the PGT's concern recognizing Shane's ownership interest in the family home. The PGT aptly pointed out that Shane's entitlement to an interest in the family home had to be determined by an independent party such as the PGT, not one determinable by the committee on one hand and the patient or his counsel on the other because, the PGT maintained, Shane was not capable himself and not capable of instructing counsel in that regard.
- [33] I note that the reasons for judgment focus quite heavily on Shane's interest in the family home and contain directions for expertly determining that interest. The final order also stipulated deadlines by which that and certain other matters had to be finalized, else the PGT would step in to be Shane's committee.
- [34] The PGT's concerns about respondent's conduct of the patient's affairs were firmly grounded and the respondent did not respond to them in a timely way; else the application could well have been avoided.
- [35] Shane's wish to have his father continue as committee was a significant consideration in the reasons; but the PGT's involvement shed light on the nature and extent of the shortcomings in the respondent's at times negligent handling of Shane's affairs, despite earlier cautions emanating from the PGT.
- [36] It is concerning that Shane has only \$13,000 cash in his account. As noted in the reasons for judgment, however, if Shane's estate had been handled and invested prudently, he should have had more cash at hand in his estate.
- [37] That said, the hard fact of the matter is he has little cash at hand at this stage, and there would have to be a significant withdrawal from reserves to cover special costs. Shane's life expectancy is longer than what we see in some of the cases.
- [38] Considering all the foregoing, including the authorities, I will vary the initial costs provision to provide that the PGT petitioner shall be paid all its reasonable costs and expenses, in other words, special costs, of and incidental to the application hearing and for submissions on costs, out of the estate of the patient but with all other costs payable at Scale "B".

"N. Brown J."

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